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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TINNAGORN HOMSAPAYA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner respectfully submits three questions for review. •First, whether dictum this Court's 1981 decision in INS v. Wang has been properly interpreted by the Government in stripping the ameliorative suspension of deportation statute of any application whatsoever. •Secondly, whether it is an abuse of discretion of the Government and courts to ignore the Simpson-Mazzoli Bill, approved in the Senate and voted out of committee in the House and pending approval on the floor there, as Congressional and Administration statements that long presence in the United States is a factor of extreme hardship for granting the relief of suspension of deportation. That is, the Government is seeking to remove and deport Petitioner, despite his twelve years here, on the eve of and depriving him of the benefits of the "amnesty" law

receiving Congressional approval in this Congress. Finally, whether the Courts of the Ninth Circuit have added a new factor not contemplated by the statute and in violation of Petitioner's due process rights, specifically that Pettioner must show that this deportation is more adverse than than suffered by some other deportee rather than considering the individual merits of the particular applicant.

LIST OF ALL PARTIES

The Petitioner is Tinnagorn Homsapaya who is seeking to become a lawfully admitted permanent resident alien.

The Respondent is the Immigration and Naturalization Service.

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Title 8, United States Code, Section 1254(a)(1).

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COURT OF APPEALS
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Robert L. Miller, Esq., on behalf of the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on November 25, 1983.

OPINIONS BELOW

The initial decision of the immigration judge ordering petitioner deported from the United States to Thailand was made on November 14, 1975.

On or about October 20, 1980, Petitioner filed a motion to reopen his deportation proceedings on the grounds that he had been in the United States over ten years, and that his deportation would result in an extreme hardship to him, and requested the ameliorative remedy of suspension of deportation.

In orders of June 5 and August 12, 1981 the immigration judge refused to reopen the proceeding.

On May 14, 1982 the Board of Immigration Appeals affirmed the immigration judge's order.

On November 25, 1983 the United States Court of Appeals for the Ninth Circuit, in a

memorandum opinion, affirmed the order for deportation on the principle ground that the narrow construction of the ameliorative remedy of suspension of deportation did not constitute an abuse of discretion.

All pertinent opinions are contained in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was made and entered on Oovember 25, 1983, and a copy thereof is appended to this Petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Original Jurisdiction in the Circuit Court of Appeals was pursuant to 8 U.S.C. Sec. 1105a(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, and the ameliorative suspension of deportation provisions of 8 U.S.C. Sec. 1254(a)(1), (please see Appendix).

STATEMENT OF THE CASE

The petitioner is 35 years old, a native and citizen of Thailand who entered the United States on or about October of 1971, at the age of 23. He has not departed the United States in the 12 years he has lived here. (CAR 75). [1/] He is the father of two United States citizen children, the ages of whom are 4 years and 2 years respectively at this writing. (CAR 13, 76). There is evidence that

[1/] "CAR" refers to the Certified Administrative Record.

said children are aliens in Thailand not entitled to the benefits of native born Thais. (CAR 55, 58).

Petitioner has one sister who is a lawfully admitted permanent resident of the United States (CAR 75B), she has an application for naturalization for United States Citizenship pending (CAR 56). At the time of the initial motion it was asserted that the petitioner would be able to obtain legal residence in the United States based upon a fifth preference visa petition to be filed by the naturalized sister, and to be able to do so within seven months (CAR 56). Petitioner requests this court to take judicial notice that the estimates at the presnet time are two and one half years to naturalize in the Los Angeles District office of the INS, and approximately three years thereafter to immigrate for brothers and sisters of United States Citizens. It was pointed out that the

petitioner and his children would be involved in a double "wrenching" or disruption, as opposed to the usual single disruption involved with most deportees (CAR 59). There was abundant evidence to the effect of civil war and political instability in Thailand, exposing the petitioner and his children to real and present danger at their destination in Thailand (CAR 60, 83-150). There is the absence of any negative factor whatsoever in the record, and the petitioner is presumed to be a person of good moral character.

On or about October 7, 1975, an Order to Show Cause was issued to the petitioner charging him with deportability under Sec. 241(a)(9) of the Immigration and Nationality Act [2/], (unauthorized employment). The government made no effort to enforce that order, the Petitioner engaged in no dilatory or evasive

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[2/] Reference hereinafter will be simply to the "Act."

conduct, and time simply passed. Thereafter, on October 1, 1981, petitioner moved to apply for suspension of deportation under the provision of Sec. 244(a)(1) of the Act, (8 U.S.C. Section 1254(a)(1)).

On or about June 5, 1981 and August 12, 1981, the administrative Immigration Judge denied the petitioner's motion to reopen for purposes of filing his Application for Suspension of Deportation. On may 14, 1982, the Board of Immigration Appeals[3/] affirmed that order (CAR 2). On November 25, 1983, the Ninth Circuit affirmed the decision of the Board, asserting as a new and novel ground that the Petitioner had not shown that his deportation was any more grievous than that suffered by any other deportee.

3/ Referred to hereinafter simply as the "Board."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The petitioner alleged many equities or elements of extreme hardship, all of which are contained in the record (CAR 54-150, 26-32, 11-19), none of which were mentioned by the decision of the Board or the Court.

Petitioner respectfully contends that the Board failed to take into consideration any of the asserted elements of extreme hardship such as the combination of double uprooting, double culture shock, double liquidation of assets upon departure, substantial diminishing of educational and economic opportunities and double readjustment of himself and two United States citizen children, ignored his family ties in the United States, ignored the pending Simpson-Mozzoli Bill, and did not apply a proper standard under Sec. 244(a)(1) of the Act.

Section 244(a)(1) of the Act (8 U.S.C. Sec. 1254(a)(1)) sets forth three requirements which, if satisfied and complied with, will and should confer the statutory relief of suspension of deportation sought by petitioner. There is no dispute as to any element other than whether petitioner has set out a prima facie case of extreme hardship in the event of his deportation.

A. IT IS THE DUTY OF THE BOARD OF IMMIGRATION APPEALS TO ARTICULATE THE FACTORS CONSIDERED TO EXERCISE ITS DISCRETION PROPERLY.

The Order of the Board of Immigration Appeals (CAR 2) disposes of the petitioner's life and future in 14 lines, all 14 of which are legal boilerplate. In those 14 lines, the Board summarily concludes that there is no showing of extreme hardship to the petitioner and his children. The Board did not

articulate any basis for its decision, but merely approved the order of the administrative immigration judge.[4/]

Any discussion of the suspension of deportation statute must now relate to INS v. Wang, 405 U.S. 139, 101 S.Ct. 1027 (1981). The Supreme Court there made two holdings, only one of which might affect this case, the other of which was unnecessary to the decision. Initially the Supreme Court there dealt only with a motion to reopen a previous deportation hearing without the affidavits required by the regulation. The Court held that the parties' failure to provide affidavits on motions to reopen was fatal. The present case specifically involves a motion to reopen, and is amply supported by affidavits. Although unnecessary, however, the

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[4/] The BIA is an agency under the Attorney General and independent of the INS, whereas an Immigration Judge is an employee of the INS. 8 C.F.R., Parts 3, 103. Lee v. INS, 685 F.2d 343 (9th Cir. 1982).

Supreme Court went on to state that the definition of "extreme hardship" is a function committed to the Attorney General alone, and not the courts. This latter holding has been characterized as dictum. (Vargas-Gonzalez v. INS, 647 F.2d 457, 458 Fn.1 (5th Cir. 1981)). Regrettably, the administrative authorities have taken this Court's language as carte blanche to virtually eliminate the statute from the Act.

The inquiry of the courts since Wang has turned from "what" is extreme hardship (interpreted as committed to the "narrow" construction of the Attorney General), to "how" the Board has reached it decision. In Perez v. INS, 643 F.2d 649 (9th Cir. 1981),[5/] the court remanded to the Board where it had provided only a summary order (similar to petitioner's) and had failed to

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[5/] The INS petitioned for Certiorari on August 11, 1982, dismissed for unrelated reasons, 459 U.S. ___, 103 S.Ct. 320.

articulate the reasons for the decision as required by 8 C.F.R. Sections 103.3 and 242.18(a). The Ninth Circuit has continued to hold that due consideration of all the factors involved in such an important decision must be articulated. Contreras-Buenfil v. INS, 712 F.2d 401 (9th Cir. 1983); Mejia-Carrillo v. INS, 656 F.2d 520, 523 (9th Cir. 1981); Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981); Sida v. INS, 648 F.2d 638 (9th Cir. 1981). When a panel of the Ninth Circuit veered from the above-cited cases, it was with a split decision and critical dissent. (Hee Yung Ahn v. INS, 651 F.2d 1285 (9th Cir. 1981)).

The Third Circuit recently reconsidered a pre-Wang decision and concluded it would decide no differently. In Ravancho v. INS, 658 F.2d 169 (3rd Cir. 1981), the court held (and the government conceded) that the Board must consider the cumulative effect of all

the evidence, and that it was not possible to presume that the Board had followed that procedure from the Board's short statement (not as short as in the petitioner's case herein).

On October 1, 1981, the Ninth Circuit reasserted that the Board must elaborate the factors and demonstrate fully consideration of all the factors, and remanded the matter to the Board for disposition consistent with this principle. Phinipathya v. INS, 673 F.2d 1013 (9th Cir. 1982).[6/] Indeed, the court there was concerned with a single "uprooting" and the effect on the U.S. citizen child, as compared with a double uprooting likely in the present case. Even more recently, the Court of Appeals reversed and remanded to the Board due to its "laconic" and "conclusory" statements

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[6/] The INS petitioned for Certiorari on July 16, 1982, argued on October 3, 1983, No. 82-9).

that failed to take into consideration the cumulaltive effect of all the factors of extreme hardship. Prapavat v. INS, 662 F.2d 561 (9th Cir. 1981). The court in Prapavat quickly distinguished the split-decision in Hee Young Ahn v. INS (supra) by noting the Board failed to provide in its decision any basis to conclude that all the factors had been considered. (Id. at only footnote). Ahn is further distinguished by the presence there of asserted adverse factors of dilatory and deceitful tactics by the parties there, completely absent in the present case. Please note that page 3 of the memorandum decision of the Ninth Circuit refers to Petitioner's "success in avoiding deportation." It would appear the case was confused with another since there was no evidence in the record of any effort to avoid deportation by this Petitioner.

What the virtually unbroken line of 1981-1983 decisions holds is that the Board (not an administrative immigration judge) must articulate and consider the cumulative effect of all the factors alleged. Please see Batoon v. INS, 707 F.2d 399 (9th Cir. 1983) and Ramos v. INS, 695 F.2d 181 (5th Cir. 1983).

This should forcefully bring us to an examination of the standards of review so as to determine if the Court of Appeals and Board have abused their discretion and violated Petitioner's rights to due process.

It is important to note the relatively obvious language of Chae Kim Ro v. INS, 670 F.2d 114 (9th Cir. 1982), involving the same issue of a motion to reopen a previous deportation order to apply for suspension of deportation. The Court there again re-emphasized that there had never been a "hearing." The only "hearing" there can be,

if the word is to have any meaning, is when the parties may present their evidence, their witnesses, cross-examine witnesses presented against them, and challenge negative evidence. Not there, and not here has there been any hearing.

Petitioner has never, ever, at any time or place, been offered the most minimal opportunity to meet and confront any of the allegations of the Government in any semblance of a hearing.

In the 1982 Ninth Circuit decision of Reyes v. INS, 673 F.2d 1087 (9th Cir. 1982), the issues were very similar. The Court there was emphatic in stressing that a motion to reopen is not intended to be a substitute for a hearing; its purpose is merely to allow the Board to screen out those claims that clearly lack merit. The Board there simply chose to believe some portions and disbelieve other important portions of the moving affidavits. The Court stressed that motions to reopen, since they are decided without benefit of a hearing, common notions of fair play and

substantial justice (due process) require that the facts alleged by the moving party be accepted as true. To disbelieve some portion, and to believe any opposing allegation, without a hearing, is a denial of the opportunity to demonstrate that the Petitioner's version of the facts is true. In electing to disbelieve some portion of the moving affidavits or believe some opposing version, places a heavy burden of evidentiary support which is inconsistent with the limited screening function served by a motion to reopen. The mere disbelief by the Board of the moving affidavits and demand for additional corroborating affidavits, was found by the Court to be arbitrary and an abuse of discretion. The scope of review by the Board and the Court is the issue of whether a prima facie showing for reopening has been made, and it is inappropriate for the Board to engage in any other determination. Footnote 3 of the Reyes decision refers to the careful balance of the appropriate Regulation in requiring

affidavits in support of motions to reopen to insure the Board's screening of claims is not illusory and permitting them to reject motions unsupported by reliable evidence, but by not requiring full evidentiary presentations the Regulation avoids the potentially high costs on the applicant of presenting his or her case in full before knowing whether the motion will be granted.

In Luna v. INS, 709 F.2d 126 (1st Cir. 1983), the Court of Appeals reversed the Board in finding an abuse of discretion in a case substantially identical to the present one. The Court there rhetorically asked "how the Board could know" whether the hardship to be suffered by the U.S. citizen children would have been no greater in the country of their father's origin, or how it could consider the adverse factors assailed against him, which he vigorously denied,

without a hearing? Since it was improper for the administrative authorities to weigh credibility (which the Ninth Circuit has approved here in adopting the Board's adoption of the decision of the immigration judge), finding only that a prima facie case had been made, an evidentiary hearing on the merits was required by the First Circuit. Since the Ninth Circuit has expressly attempted to distinguish Luna v. INS in its Memorandum decision (Appendix, pg. A-17) it is extremely important that the cited First Circuit decision be considered for its persuasive effect. To the extent it is contrary, we have a conflict between the Circuits.

Here the Petitioner submitted approximately 37 pages of affidavits, plus approximately 73 pages of exhibits. The substance of the moving affidavits received no consideration at all by the Board (recalling

that the Board of Immigration Appeals is an agency distinct from the immigration judge (Lee v. INS, (supra)).

The petitioner pointed to his 12 years in this country, his 2 U.S. citizen children, his absence of any arrest record, his acquisition of a restaurant and home and his inability to liquidate same, the martial law and coups and counter-coups simultaneously taking place in Thailand, the fact that his children are aliens in Thailand and the continuing dager to them from guerrilla and North Vietnamese activity overflowing the Thai borders, etc. The Board gave no consideration to any factor, zero. Even assuming that the Board could delegate its statutory duty by reference to the decision of the immigration judge, he engaged in exactly that which was branded impermissible by the Court in Reyes, supra, by weighing the credibility of the counter-

affidavits presented without a hearing.

In the present case, the immigration judge chose to weigh selectively two items of evidence presented by the INS, completely disregard reams of evidence to the contrary presented by Petitioner, including later materials (CAR 28-29), and thereupon, weighing the evidence, assessed his own evaluation that conditions have improved in Thailand (CAR 22-23). This is precisely the element of assessment of credibility condemned by the Court in Reyes, and the denial of any hearing at all. This impermissible process thus becomes part of the Board's decision, and ultimately the decision of the Ninth Circuit in adopting the decision of the administrative immigration judge.

Regardless of whether the administrative immigration judge may have recited a laundry-list of factors, there was no effort by him

to weigh the factors cumulatively. Moreover, the thrust of the cited decisions is that the Board of Immigration Appeals, must show its deliberative process. The Petition to the Court of Appeals and to this Court is from a decision of the Board, and it is that decision which is being reviewed, not the 1981 decision of the immigration judge, as adopted by the Board and ultimately by the Ninth Circuit here.

A mere glance at the decision of the Board indicates it is exactly the conclusory and laconic sort of an order critisized by the Courts repeatedly in the recent past. The Circuit Courts of Appeals have recently and repeatedly held that the Board must consider all of the relevant factors and weigh them cumulatively, rather than as isolated factors. The use of the word "cumulative" in the Board decision is obviously an attempt to substitute the word

for the deliberative process. (Please see Luna v. INS, supra.)

B. SUSPENSION OF DEPORTATION IS AMELIORATIVE IN INTENT AND TO BE CONSTRUED LIBERALLY.

Since the statutory provisions for suspension of deportation are remedial in nature, they should not be strictly and technically construed. (Wadman v. INS, 329 F.2d 912 (9th Cir. 1964)), and therefore in this type of proceeding equitable standards rather than legal standards should be applicable.

Petitioner accepts that the burden of establishing statutory eligibility rests with the applicant (Pelaez v. INS, 513 F.2d 203 (5th Cir. 1975)). But petitioner contends that he has established the statutory eligibility considering the fact that the remedy is equitable rather than legal.

The legislative history of the Act indicates that the statutory relief granted in Sec. 244(a)(1) INA is for the purposes of family unity, based upon equitable and humanitarian grounds and the Act grants the remedy to those individuals who have no other remedial device and therefore is applicable to the petitioner.

It is well settled law that in order to construe any given statute the court will look to the legislative intent and the class of person for whose benefit the statute is enacted.

In view of the recent Congressional provisions regarding "amnesty," (a form of statute of limitations otherwise absent in immigration law), a review of the legislative intent is important. Prior to the 1952 Act, the standard for suspension of deportation was the establishment of "serious economic detriment," substituted in the 1952

enactment of 8 U.S.C. Sec. 1254(a)(1) with the phrase "exceptional and extremely unusual hardship." Senate Report No. 1137, accompanying S. 2550, 82nd Congress, the bill which, in substance, with H.R. 5678 of the same Congress, became the law, in which the Senate Judiciary Committee stated that:

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced. . . . Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. (emphasis supplied).

In what was apparently an overreaction creating a statutory standard which could not be met by anyone, in 1962 the law was amended to substitute the present "extreme hardship" standard. (Pub.L.87-885). In returning to the ameliorative intent of the law, Congress has for all effects and purposes equated "extreme hardship" with "unusual hardship" which it recognized in 1952 as frequently present in the cases. (H. Rept. No. 94-509, 94th Congress, 1st Sess., p. 17). This would seem logical since an applicant must have had 7 years continuous presence, good moral character during that time, plus the U.S. citizen or permanent resident relatives subject to the hardship.

The most recent expression of Congressional intent, was the passage (76 to 18) of S.579 on May 18, 1983, known as the "Simpson-Mazzoli Bill." Sec. 301 of that Bill, sponsored by the Administration,

authorizes legalization of persons present in the U.S. since before January 1, 1980. The House version, HR 1510, contains in Sec. 301 an even more liberal "amnesty" date of January 1, 1982, and this Bill has been voted out of Committee and will probably receive Floor action (and approval) in the second session of the 98th Congress. This is a consistent restatement by Congress of the widely-held belief that long and peaceful residence in the U.S. creates such equities as are deserving of recognition. Attempts by the INS to interpret "extreme hardship" to mean "exceptional and extremely unusual hardship," a standard abandoned by Congress, rather than to interpret the term as "unusual hardship" as obviously construed by Congress, is an effort to deprive this petitioner of the fruits of a position which the Administration is presently advocating before Congress in seeking adoption of the

Simpson-Mazzoli Bill. By the Petitioner's reference to pending legislation, Petitioner would not for an instant suggest that the government should suspend enforcement of existing laws every time a legislative body was considering changes in those laws. However, this is not just any law, nor any legislative body. Petitioner does not suggest that the INS suspend its enforcement of anything, but that as one factor of the element of extreme hardship, in establishing a prima facie case, it is important at least to consider the effect, if any, of pending legislation, cumulatively with all other elements. This pending legislation, the "Simpson-Mazzoli Bill" is an Administration-sponsored Bill. It has passed the Senate, and has been voted out of the House Judiciary Committee on May 5, 1983. At the writing hereof it is uncertain when the full House will act (probably in

January of 1983), and the President's signature is guaranteed. The Government would snatch from the Petitioner the unquestioned "amnesty" provisions which would benefit him by denying to him even consideration by the Board of the intent expressed repeatedly by the Congress to recognize and ameliorate the hardships inherent in forceful removal of longtime residents of the U.S. We would recall at this juncture that the concepts of a statute of limitations or laches which permeate all aspects of all of our jurisprudence, are conspicuous by their absence in the Immigration and Nationality Act. The closest that we can come to a statute of limitations, is the precise same suspension of deportation statute under consideration herein.

In addition to the foregoing factors, Petitioner alleged other elements of extreme hardship which did not receive consideration.

Petitioner asserts that the deportation of himself and ultimately (de facto) his United States citizen children violates the spirit, if not the letter, of the laws which require a child born outside the United States territory to citizen parents must reside within the United States for a specified amount of time in order to retain his or her citizenship and transmit it to descendants (e.g., Sec. 301(a)(7) INA (8 U.S.C. Sec. 1401(a)(1)). The reason behind these statutory requirements is that a United States citizen is expected to be familiar with United States language, culture and customs. Also, the loyalty and attachment to the United States and its government is questioned with regard to a United States citizen who has not satisfied the statutory requirements of his or her residency.

The legislative history of these statutes indicate the intent to overcome the possibility that this category of United States citizens might grow up with interests hostile to the United States if they have had no ties with this country. (See, Weedin v. Chin Bow, 274 U.S. 657 (1977)). Therefore, in fact the deportation of petitioner's children might cause and produce, in future time two United States citizens who are not familiar with United States customs, not familiar with their native language and therefore hostile to the interests of the United States.

What petitioner seeks to point out, and an issue rarely reached is the factor of "double disruption," combined with the element discouraged in our own legislation of creating "colonies" of U.S. citizens outside the U.S. with interests hostile to those of the place of their birthright.

It is respectfully suggested that this factor deserves considerably more weight than the rather flip response that young children adjust easily. These same children will become adults with strong feelings about hardships suffered by themselves and their parents at the hands of the Government.

Petitioner was 23 years of age upon his arrival in the United States, and is over 35 at the time this is read by the Court.

An issue assumed in almost all cases is that the aliens had no prospective future rights to immigrate to the United States, certainly not in the foreseeable future. Therefore, the cases simply spoke of a mere inconvenience and an easy readjustment. That might be true, for the sake of argument, but what about the second readjustment? With the continued retrogression in fifth preference (brothers and sisters of U.S. citizens) visas, it is not unlikely

that these same United States citizen children will be 9 and 7 when they will <u>again</u> be uprooted to reclaim their birthright. How can it be that "outbound" disruptions of United States citizen children of non-tender years are less disruptive than "in-bound" disruptions for the same children? While a single uprooting might be more tolerable in view of a permanent move with no hope of reimmigrating, should not great consideration be given to a <u>double</u> uprooting? While we may give short shrift to the lack of educational or other advantages in foreign nations, do we not find it grossly unfair that our United States citizen children might properly return to the United States in the lawful presence of their parents only a few years later and be seriously disadvantaged compared to their peers so that they could perhaps never catch up with even where they properly would have been had they not

been so disadvantaged? Might we not give greater consideration to the creation of a hostile colony of United States citizens who will return in only a few short years filled with bitterness for what the United States government imposed upon their parents and themselves? It provides little satisfaction to repeat the canard that the United States citizen children are not being deported and that the de facto deportation although recognized gives no right to the parents. We are not discussing the right of the parent not to be deported, however, we are discussing the element of extreme hardship to the U.S. citizen children expressly written into the Act.

Repeating. No case seems to have discussed the double uprooting, particularly when it is completely unnecessary. That is, at the present time the fifth preference is about three years behind. Viewed from that

perspective, what legitimate interest is served by removing the family for a few years to then permit the children to "easily adapt" to living conditions in some other country, only to uproot them again thereafter to repeat the process when it might not be so "easy"? Assuming that the fifth preference takes longer, the petitioner's United States citizen children might well be 7 and 9 or older. Does not the reasoning which makes an uprooting of children of such ages out of the United States evidence of extreme hardship, but not the uprooting to bring them back (remembering it is the uprooting which cuases the hardship), seem captious?

Finally, Petitioner expresses objection to the apparent creation of a totally new element by the Ninth Circuit herein, (Appendix pg. A-17), of "comparative harsdhip." When the Court below stated its opinion that the

Petitioner had failed to distinguish himself from other aliens who had overstayed their student visas and managed to prolong their stays, it has violated Petitioner's right to due process in adding an element not contained in the statute. The issue is extreme hardship, not comparative hardship. If every alien who had spent the 7 to 10 years physically present in the U.S. as required by the statute, and had been persons of good moral character during that period (presumably acquiring children, properties, education, experience, etc., during that period), could be shown to be subject to execution upon return to their home countries, the Ninth Circuit's new element would deny suspension of deportation on the ground that the applicant could not be shown to suffer any more hardship than any other alien who had shared the same experience. This is not the standard, and is not the

rule of the statute. For the Court below to have injected this element, while at the same time adopting the decision of the Board, which in turn adopted the fact-finding and evidence-weighing of the immigration judge, is violative of due process and an abuse of discretion.

CONCLUSION

In its dictum in INS v. Wang, the Supreme Court suggested that the administrative authorities have broad discretion to "interpret narrowly" the remedial and ameliorative suspension of deportation statute. The INS has taken this language as license to have virtually eliminated the statute from the Immigration and Nationality Act, and the decisions of the Circuit Courts of Appeal are in conflict and disarray.

The duty of the administrative authorities is to consider all the elements of extreme hardship, and to consider them cumulatively. Here, the Board of Immigration Appeals did not consider any element at all, but merely adopted the decision of the administrative immigration judge, which itself weighed evidence and assessed credibility, in the absence of any right to a hearing. This is contrary to the rights of due process as interpreted by the Courts.

The administrative authorities abused their discretion in failure to consider many elements at all, and specifically the pending Simpson-Mazzoli Bill. The effect will be to snatch from the Petitioner that which Congress has expressed in the "amnesty" provisions now about to become law.

Finally, the courts, and specifically the Ninth Circuit here, have judicially amended the suspension of deportation statute

by adding a new element of "comparative hardship," an abuse of discretion and violation of Petitioner's Fifth Amendment rights to due process of law.

It is respectfully submitted that this Court can and should explain upon the factual and legal history of the present case, what it placed asunder in its 1981 decision of INS v. Wang.

Respectfully submitted,

MILLER & MILLER

By: ROBERT L. MILLER

Attorney for Petitioner

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
LOS ANGELES, CALIFORNIA

File No. A21 524 795 Date: June 5, 1981

In the Matter of)
)
Tinnagorn HOMSAPAYA,) IN DEPORTATION
) PROCEEDINGS
Respondent.)
)

CHARGE: I&N ACT, Section 241(a)(9), non-immigrant failed to comply with conditions of status

APPLICATION: Motion to Reopen

IN BEHALF OF RESPONDENT:

Robert L. Miller,Esq.
2500 Wilshire Boulevard
Suite 1018
Los Angeles, CA 90057

IN BEHALF OF SERVICE:

Carl Shusterman, Esq.
Trial Attorney
Los Angeles, CA
90012

ORDER OF THE IMMIGRATION JUDGE

The respondent is a thirty-year old male alien, a native and citizen of Thailand. He was admitted to the United States on October 13, 1970 as a nonimmigrant student for a temporary period. In a deportation

held on November 14, 1975 before Immigration Judge Henry J. Scroope, Jr., he was found deportable under Section 241(a)(9) of the Immigration and Nationality Act for having violated his nonimmigrant status in that he was employed for pay without Service authorization. At the hearing, respondent designated Thailand as the country of deportation and applied for the discretionary relief of voluntary departure.

Since the respondent had on October 10, 1975 married a citizen of the United States who had filed a visa petition on his behalf, the Judge granted respondent one year in which to depart the United States voluntarily. The Service appealed this decision, but withdrew the appeal on December 8, 1975.

On October 20, 1980 a Motion to Reopen the deportation proceedings was filed based upon an application for suspension of deportation

and on January 26, 1981 an application for suspension of deportation (Form I-256A) was filed with the Service. Inadvertently, the motion was forwarded to the Board of Immigration Appeals, but on April 14, 1981 the file was returned to Los Angeles.

In seeking to reopen a deportation proceeding to consider an application for suspension of deportation, the respondent bears the burden of demonstrating prima-facie eligibility for the relief sought, Urbano de Malaluan v. INS, 577 F.2d 589 (9CCir. 1978).

In the motion to reopen the respondent states that, "the country of Thailand is presently under martial law," and that the political conditions now existing in his native land would cause him extreme hardship if he were to return to Thailand. To document these claims he submitted newspaper

and magazine articles and an excerpt from Amnesty International Report 1969. This argument is based on outdated information. Political conditions are improved from the 1977-79 period. Amnesty International Report 1980 indicates the improvement.

Regarding the possibility of armed confrontation along Thailand's border, respondent submitted an article, dated July 26, 1980. However, a more recent article indicates that the border strife has ended, and that the emergency is over (Los Angeles Times, February 15, 1981).

Respondent's other principal argument is that he would suffer economic hardship if he returned to Thailand. Respondent does not own a home in the United States that he would be forced to sell. He is a thirty-three year old male alien and is apparently in good health. He has accumulated a minimum

of $35,000 in the United States. This money would mitigate any economic hardship, whether he uses the money to purchase a business or to support himself and his family until he obtains employment. He is a young man returning to his native country in which he lived for twenty-three years. He will be returning to his parents and to his brother. He will not be going penniless, but with $35,000 which he accumulated in the United States. Furthermore, if he chooses, he may be able to legally immigrate to the United States through his sister, an applicant for United States citizenship.

In his motion, the respondent has failed to make a prima facie showing of extreme hardship to himself. The motion is lengthy and alleges various types of hardships and are unsupported by the evidence presented. Some of these hardships are speculative and some

are entitled to receive little weight as evidence.

He claims hardship not only to himself, but to two children who are citizens of the United States. The younger child was to be born December 20, 1980, but no birth certificate has been received. The other child is two-and-a-half years old and was born to respondent and a woman other than his wife. The mere existence of a citizen child, without more, neither validates an otherwise invalid claim of extreme hardship to the alien nor automatically establishes extreme hardship to the child, Choe v. INS, 597 F.2d 168 (9 Cu 1979).

There are no allegations that the children suffer from any medical problems. The children are not yet of school age and could easily adjust to education in the other country. There is no claim that the

children would suffer from separation from respondent's brothers and sisters. In fact, there is no indication that any relationship exists between respondent's brothers and sisters and his children. In this case, the children have not become acculturated to life in the United States. They should have no difficulty adjusting to life in a new country. A prima facie case of extreme hardship to these United States children has not been established.

Since a prima facie case for eligibility for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act has not been established, reopening is denied.

ORDER: The Motion is denied.

/s/
George Indelicato
IMMIGRATION JUDGE

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES IMMIGRATION COURT

Los Angeles, California

File No: A21 524 795 August 21, 1981

In the Matter of)
)
TINNAGORN HOMSAPAYA) IN DEPORTATION
) PROCEEDINGS
Respondent)

CHARGE: I&N Act, Section 241(a)(9), non-immigrant failed to comply with conditions of status.

APPLICATION: Motion to Reopen.

IN BEHALF OF RESPONDENT:

Robert L. Miller,Esq.
2500 Wilshire Boulevard
Suite 1018
Los Angeles, California
90057

IN BEHALF OF SERVICE:

Carl Shusterman, Esq.
Trial Attorney
Los Angeles, California 90012

ORDER OF THE IMMIGRATION JUDGE

On June 5, 1981 respondent's motion to reopen seeking consideration of an application for

suspension of deportation was denied. Because the Second Supplemental Affidavit dated March 13, 1981 was not seen or considered by the Trial Attorney or the Immigration Judge, I vacated my decision of June 5, 1981 denying the Motion to Reopen.

The arguments presented in the Second Affidavit were not sufficiently persuasive to make any difference in my decision. The recent submission of the birth certificate of the new child, without more, is not significant. The recent newspaper articles do not provide any meaningful information showing any instability in Thailand. In fact one article states that "Thailand is still remarkably stable."

After careful consideration of the arguments put forth in the Second Affidavit and the recent material submitted, I see no reason

for changing my position finding that a prima facie case of extreme hardship has not been established.

ORDER: IT IS ORDERED that my decision of June 5, 1981 is hereby reinstrated and the Motion to Reopen is denied.

George Idelicato
Immigration Judge

Received
MAY 21 1982

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

SEAL

WASHINGTON, D.C. 20530

MAY
14 1982

File: A21 524 795 - Los Angeles

In re: TINNAGORN HOMSAPAYA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Robert L. Miller, Esquire
Miller & Miller
2500 Wilshire Boulevard
Suite 1018
Los Angeles, California
90057

ON BEHALF OF SERVICE: Carl Shusterman
General Attorney

CHARGE:

Order: Sec. 241(a)(9), I&N Act (8 U.S.C. 1251(a)(9)) - Nonimmigrant - failed to comply with the conditions of status under which admitted

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent's appeal from the denial of his motion to reopen the deportation proceedings for the purpose of applying for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), is dismissed for the reasons set forth in the immigration judge's decisions of June 5, 1981, and August 12, 1981, the rationale of which we adopt. The respondent's request for oral argument is denied. Upon careful consideration of the cumulative effect of the claims of hardship advanced by the respondent, we are satisfied that he has failed to make a prima facie showing that his deportation would result in extreme hardship to himself or his United States citizen children and, hence, that he is statutorily eligible for the relief sought under section 244(a)(1).

Chairman

Received
Nov 28 1983

FILED
Nov 25 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TINNAGORN HOMSAPAYA,	)
	)
Petitioner,	) No. 82-7327
	)
v.	)I & NS No.
	)A21-524-795
IMMIGRATION & NATURALIZATION SERVICE,	)
	)M-E-M-O-R-A-N-D-U-M
Respondent.	)

Appeal from the Board of of Immigration Appeals
Argued and submitted August 4, 1983

BEFORE: GOODWIN and ANDERSON, Circuit Judges, and CROCKER,* District Judge

The panel has concluded that the issues presented by this appeal do not meet the

*The Honorable Myron D. Corcker, Senior United States District Judge for the Eastern District of California, sitting by designation.

standards set by Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memerandum may not be cited to or by the courts of this circuit.

Tinnagorn Homsapaya appeals a decision of the Board of Immigration Appeals affirming the administrative law judge's denial of his motion to reopen deportation proceedings to apply for suspension of deportation under 8 U.S.C. Sec. 1254(a)(1).

Homsapaya contends that the Board abused its discretion by relying on the administrative law judge's reasoning instead of articulating the factors it considered. This contention is without merit. The Board relied on the administrative law judge's rationale set forth in two decisions. Those decisions supply the reasons required by the

Immigration and Naturalization Service regulations. Ramirez-Gonzalez v. I.N.S., 695 F.2d 1208 (9th Cir. 1983); Mawji v. Immigration and Naturalization Service, 671 F.2d 342, 344-45 (9th Cir. 1982).

Next. Homsapaya contends that the administrative law judge did not weigh cumulatively the hardship factors presented in his affidavit. While the judge's decision can be read as having considered some of the factors in isolation rather than cumulatively, it does not follow that the decision was inconsistent with Prapavat v. Immigration & Naturalization Service, 662 F.2d 561, 562 (9th Cir. 1981). The judge considered the case as a whole and made a rational decision that was consistent with the controlling cases.

Because it does not ordinarily hear the parties, but deals with a paper record, we have held that the Board must accept the

truth of the facts asserted in an alien's affidavits, Reyes v. Immigration and Naturalization Service, 673 F.2d 1087, 1090 (9th Cir. 1982), unless the facts are "inherently unbelievable." Hamid v. Immigration & Naturalization Serv., 648 F.2d 635, 637 (9th Cir. 1981). With these points in mind, we turn to the challenged order.

The Board of Immigration Appeals has broad discretion to deny or grant motions to reopen. Reyes v. Immigration and Naturalization Serv., 673 F.2d at 1089. This court reviews denials of motions to reopen under the abuse of discretion standard. Chae Kim Ro v. Immigration & Naturalization Service, 670 F.2d 114, 116 (9th Cir. 1982).

Assuming the truth of all of Homsapaya's factual allegations, which is appropriate when there was no hearing, the facts do not

necessarily add up to extreme hardship. The record contains nothing to distinguish this alien from others who overstayed student visas and then attempted by various means to delay deportation. Most of the hardship claimed here is the loss of the accrued fruits of the alien's success in avoiding deportation. No factual allegations suggest that this alien will be mistreated or subjected to any hardship not attendant upon any would-be immigrant's unwilling return to his native land. There is likewise no showing of hardship to his preschool children. We have examined Luna v. I.N.S., 709 F.2d 126 (1st Cir. 1983). We find in Luna an accumulation of hardships that caused the court to believe that Luna should have a hearing. We believe that the facts in this case are more nearly like those in INS v. Jong Ha Wang, 450 U.S. 139 (1981). We cannot, therefore, say that the Board abused its discretion.

Affirmed.

UNITED STATES CODE

Title 8, Sec. 1254(a)(1) (Sec. 244(a)(1) Immigration and Nationality Act).

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and--

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the

opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or . . . .

Title 28, Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;